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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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*No.*_____

UNION TRUST COMPANY, a corporation, as trustee under Paragraph Nineteenth of the will of Ann Porter, deceased,

Petitioner,

vs.

BERTHA PAULINE GENAU, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Union Trust Company, a corporation, as trustee under Paragraph Nineteenth of the will of Ann Porter, deceased, respectfully submits this petition for a writ of certiorari to the Supreme Court of Florida to review a decision of that Court hereinafter more specifically designated.

SHORT STATEMENT OF MATTER INVOLVED

Ann Porter died at St. Petersburg, Florida, on December 20, 1940. Her will was admitted to probate in the County Judge's Court of Pinellas County, Florida, on January 2, 1941. Letters testamentary were issued to Robert S. Baynard as executor under the will. The estate is still in the process of administration. (383-384)

Paragraph Nineteenth of Mrs. Porter's will contains a specific devise of the two Albemarle Hotels, in St. Petersburg, Florida, and a specific bequest of an insurance policy, to the Union Trust Company, petitioner herein, as trustee for certain charitable organizations and purposes. The will specifies that the trust shall be known as the Porter-Genau Memorial Fund in honor of the deceased husband and two deceased brothers of Mrs. Porter. (16-18)

Mrs. Porter's residuary estate was bequeathed to her three step-children and to her niece in equal shares. (19, 394)

All of the questions raised by this petition are based upon Paragraph Nineteenth of Mrs. Porter's will. This Paragraph provides that the property thereby devised to the Union Trust Company shall be held in a perpetual trust. One half of the income from the trust is to be paid out annually in perpetuity to the following organizations and purposes in the following proportions: The Theosophical Society — 50%; crippled children through the Rotary Club of St. Petersburg, Florida — 12½%; Faith Mission of Crystal Beach, Florida — 12½%; shoes for the needy white and colored children through the Exchange Club of St. Petersburg, Florida — 10%; library for girls through the Woman's Club of St. Peters-

burg, Florida — 5%; Mercy Hospital of St. Petersburg, Florida — 5%; Florence Crittenden Home of St. Petersburg, Florida — 2½%; and eyeglasses through the Lions Club of St. Petersburg, Florida — 2½%. The remaining one half of the trust income is to be added to the principal of the trust each year in perpetuity for the purpose of preserving the trust fund. (16-18)

The decisions of the Supreme Court of Florida with reference to the effect of a provision for adding part of the income to the principal of a perpetual charitable trust being inconsistent, the Union Trust Company, as trustee under Paragraph Nineteenth of the will, filed a suit in the Circuit Court of Pinellas County, Florida, under the declaratory judgments statutes of that State, to determine the effect of the direction in Paragraph Nineteenth to add one half of the trust income to principal in perpetuity. (43,383) A similar suit was filed by Robert S. Baynard, as executor under the will. (1,383) Both suits were then consolidated. (33-34, 383)

The principal defendants in these suits were Gardner Ives Porter, Mrs. Frank Bradford, and Mrs. Joseph McMeekin, the three step-children of Mrs. Porter and three of the four residuary legatees under her will. (39,75,394) Mrs. Frank Bradford died pending the suit and her successors in interest were thereafter substituted as parties. (42) These defendants took the position that the trust created by Paragraph Nineteenth of Mrs. Porter's will was entirely invalid and that the trust property consequently fell into the residuary estate. They claimed that the trust was invalid for two reasons: First, because of the provision for adding one half of the trust income to principal in perpetuity, and second, because none of the organizations or purposes which were beneficiaries of the

trust were charitable organizations or purposes. (77, 81-82, 384, 391)

The principal attack was directed against the Theosophical Society. The record discloses that this Society is an international organization. It was founded in New York City in 1875. Its present headquarters are in Covina, California. The Society is composed of national sections and the national sections are composed of lodges. The present national sections of the Society are the American-Canadian, the English, the Welsh, the Scandinavian, the Latin-American, the South African, and the Australasian. There are about sixty-five lodges of the Society in the United States, located in the principal cities of this country. (85, 91-92)

Mrs. Porter was a member of the Theosophical Society. (92) The Society was obviously the most favored beneficiary under her will since the property devised to the trust created by Paragraph Nineteenth constituted two thirds of the value of Mrs. Porter's estate (56-57, 384) and the interest of the Theosophical Society under the trust is equal to that of all the other beneficiaries combined. (17-18)

The principal teachings of the Theosophical Society are the doctrines of Karman and reincarnation. Briefly, the doctrine of Karman is that each thought, word, emotion, and act of an individual releases a force of some kind — whether physical, mental, or spiritual — which force, in turn, reacts upon him, and that his character is thus, at any given moment, the result of all that he thought, said, felt, and did in the past, and that his future character is determined by his past and present thoughts, words, emotions, and acts. (96)

The Theosophical doctrine of reincarnation is based upon the theory that the individual soul or spirit cannot possibly attain its highest state of development in one lifetime, and that it must return to this earth through numerous lives until it has learned all of the lessons which this world can teach, and until it has developed the power, through righteous living, to exist on a higher spiritual plane, after which it returns no more. (96,180-181)

As a necessary part of its doctrines of Karman and reincarnation, the Theosophical Society teaches observance of the highest standards of ethical and moral conduct, for, according to its teachings, it is only by such conduct that the spirit can, through successive lifetimes, lift itself to a higher spiritual plane. (101) The Theosophical Society also teaches belief in a Supreme Being, but the Supreme Being of the Theosophist is a spiritual force pervading the entire universe and beyond the power of the finite mind to define or understand. (104, 181) The principal activity of the Theosophical Society is the teaching of its doctrines and beliefs. (109-111)

The three residuary beneficiaries Porter, Bradford, and McMeekin strenuously contended that the Theosophical Society was not a religious organization. The importance of this issue in the Florida courts is apparent from the fact that, of the record now before this Court, 265 of a total of 502 pages consist of testimony and exhibits with reference to the nature and purposes of the Theosophical Society. The Union Trust Company, as trustee, maintained with equal insistance that the Theosophical Society was a religious organization, but the Union Trust Company further maintained that, if the Theosophical Society was deprived of its interest in the Porter Trust on the ground that it was not a religious organization, the

right of religious liberty guaranteed to it by the Constitution of the United States would thereby be violated.

However, the Circuit Court of Pinellas County, Florida, upheld the validity of the Porter trust. It held, in accordance with the practically unanimous authority both in Florida and other states, that the provision for adding one-half of the trust income to principal was valid and should be permitted to operate, but under the supervision of a court of equity so as to prevent the trust from becoming so large as to be a public menace. (384-390, 397) The Circuit Court also held that all of the beneficiaries of the trust were charitable organizations or purposes. (390-392) The court specifically held that the Theosophical Society was a religious organization. (390-391)

As to the constitutional question raised by the Union Trust Company, the final decree of the Circuit Court contains this finding: (391)

> "The trustee has insisted that, if the Theosophical Society was held not to be a religious organization, the Florida and Federal constitutional guaranties of religious liberty would be violated. The argument is that, under these constitutional provisions, there is a full and free right to entertain any religious belief and to teach any religious doctrine which does not violate the law or public morals, that this includes the right to organize associations for religious teaching, and that this, in turn, includes the right to receive donations, by will or otherwise, without which such an organization cannot exist. However, in view of the ruling of this Court that the Theosophical Society is a religious organization, it is not necessary to pass upon the constitutional question so raised."

The defendents Porter, Bradford, and McMeekin appealed from the final decree of the Circuit Court to the

Supreme Court of Florida. (400-401) In its brief and oral argument before the Supreme Court of Florida, the Union Trust Company, as trustee, insisted that a reversal of the Circuit Court ruling that the Theosophical Society was a religious organization would violate the Federal constitutional guaranty of religious freedom. For the purpose of establishing that this constitutional question was raised in the Supreme Court of Florida, there is attached to this petition, as Exhibit "A", a copy of eight pages from the brief filed by the Union Trust Company in the Supreme Court of Florida in which the constitutional question is discussed. (See pages 47 through 54, infra)

The Supreme Court of Florida reversed the decree entered by the Circuit Court and held that the trust created by Paragraph Nineteenth of Mrs. Porter's will was entirely invalid. (414-423, 426)

Unfortunately, however, the opinion rendered by the Supreme Court of Florida in support of its decision is obscure. The real ground of the decision is not clearly defined. The ground upon which the Court most insists is that the trust violates the rule against perpetuities because the beneficiaries of the trust are private and not charitable organizations. But the Court also attempts to reinforce its decision with two other grounds. First, it indicates that the trust may be entirely void because, in its opinion, Mrs. Porter's motive in setting up the trust was not charitable, but to create a memorial. Secondly, the Court states that the trust may be invalid because of the direction to add one-half of the trust income to principal each year.

The opinion of the Supreme Court of Florida contains no discussion of the religious nature of the Theosophical Society. Nor does the opinion specifically mention or dis-

cuss any of the beneficiaries of the trust except insofar as their names are contained in matter quoted from Mrs. Porter's will.

But the opinion does contain a discussion of the difference between a private and a charitable trust and at the conclusion of this discussion is the following statement: (421)

> "The principal reason for deciding whether a given trust is charitable or not is to determine the period of enjoyment of the described property. If the trust is dominantly charitable, then its perpetual character is not a vice under the law, but, on the other hand, if the trust is dominantly private, then its period of enjoyment is limited to no longer than lives in being when the trust started and twenty-one years thereafter plus the period of gestation."

The Court then rules that "the creation of the Porter-Genau Memorial Fund in perpetuity violates the common law rule against perpetuities and our former adjudications." (421) Again in concluding its opinion, the Court states: (425)

> "We have reached the conclusion in the case at bar that paragraph 19 offends the rule against pepetuities and our previous adjudications."

In view of the Court's ruling that a charitable trust cannot violate the rule against perpetuities, the conclusion is inescapable that the Court considered the beneficiaries of the Porter trust to be non-charitable organizations even though it did not expressly so state. The Court thus necessarily ruled that the Theosophical Society was not a religious organization. Petitioner, the Union Trust Company, as trustee, submits that the Theosophical Society has thus been deprived of the religious freedom guarantied by the Federal Constitution.

As to the two other grounds upon which it may be contended that the decision of the Supreme Court of Florida was based, they are so clearly untenable as to lead to the conclusion that the real ground of the decision was the one which included a determination that the Theosophical Society was not a religious organization. And since this Court has held that, where a state court decision is asserted to be based upon non-Federal as well as Federal grounds, it will nevertheless take jurisdiction if the asserted non-Federal grounds do not independently and adequately support the judgment, it is appropriate to briefly analyze the asserted non-Federal grounds in this case.

First, the Court indicates that the trust may be invalid because, as the Court states, "our studied conclusion is that the dominant purpose or intention of the testatrix was not charity but the creation and preservation of the Porter-Genau Memorial Fund in perpetuity." (420) Aside from the terms of the will, there is not a scintilla of evidence in the record as to Mrs. Porter's intention in creating the trust. The Court's "studied conclusion" must therefore have been based only upon the language of the will, and the will contains nothing to disclose motive except the use to be made of the trust funds and the statement that the trust is to be known as the "Porter-Genau Memorial Fund." The law is quite clear that the sole test of a charitable trust is whether the funds are to be used for charitable purposes. Speculation as to whether the donor's motive may have been to create a memorial is immaterial. Argument is unnecessary to demonstrate that a trust may be charitable and may also create a memorial. From one end of this land to the other there may be found hospitals, colleges, libraries, museums, and similar char-

itable institutions which bear the name of some person whose memory the donor wished to preserve in perpetuity. Prior to the instant case, it had never been suggested that perpetual trusts for the support of such institutions were void because the institution, though charitable in purpose, was intended to perpetuate the memory of some person designated by the donor.

Second, the Supreme Court of Florida indicates that the Porter trust may also be invalid because of the provision for adding one half of the trust income to principal in perpetuity. This ground is likewise utterly untenable. Though many courts have passed upon such trust provisions, there is not a single American decision in which such a provision has been held to invalidate an entire vested charitable trust. In one prior decision (Patillo v. Glenn, 150 Fla. 73, 7 So. (2nd) 328), the Supreme Court of Florida has itself upheld the validity of a provision in a charitable trust requiring all of the income to be added to principal in the form of loans to students. In another of its prior decisions (Pelton v. First Trust & Savings Bank, 98 Fla. 748, 124 So. 169), the Supreme Court of Florida held that a provision for adding one half of the income to the principal of a charitable trust would, at the most, invalidate only part of the trust. Yet in its decision in the instant case, the Supreme Court of Florida ignored the Patillo case, and made an incorrect statement of its decision in the Pelton case in contending that the Pelton case supported its decision in the instant case invalidating the entire Porter trust. These actions of the Supreme Court of Florida could hardly have been due to negligence, since the very decree which the Court reversed contained a clear and complete statement of both the Patillo and Pelton cases and their application to the case

at bar. In fact, the action of the Supreme Court of Florida on this question is such as to suggest the possibility that it was attempting to support its decision by a non-Federal ground.

However, as previously stated, this Honorable Court has, in numerous cases involving Federal constitutional questions, taken jurisdiction to review state court decisions which were asserted to rest on non-Federal grounds where the non-Federal grounds were so plainly unfounded that they might be regarded as essentially arbitrary or a mere device to prevent the review of the decision upon the Federal question.

Petitioner submits that the instant case comes within this rule.

JURISDICTIONAL STATEMENT

Jurisdiction to grant certiorari in the instant case is conferred upon this court by Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344-b).

The judgment of the Supreme Court of Florida to be reviewed was rendered on October 11, 1946. (413-426) A petition for rehearing filed by the Union Trust Company, as trustee, was denied by the Supreme Court of Florida on November 21, 1946. (461-462)

QUESTIONS PRESENTED

1. Does the record in this case show that a Federal constitutional question was raised and decided adversely to the petitioner by the Supreme Court of Florida?

2. Is the Theosophical Society a religious organization within the meaning of the law?

3. Are the rights of the Theosophical Society as a beneficiary of the trust created by Paragraph Nineteenth of Mrs. Porter's will protected by the Federal constitutional guaranty of religious liberty?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The Union Trust Company, as trustee, maintained at the trial of this case in the Circuit Court of Pinellas County, Florida, that the rights of the Theosophical Society as a beneficiary of the Porter trust were protected by the Federal constitutional guaranty of religious freedom. The Circuit Court held that it was unnecessary for it to pass upon the constitutional question so raised because of its finding that the Theosophical Society was a religious organization and was entitled to the benefits conferred upon it under Mrs. Porter's will. On appeal to the Supreme Court of Florida, the Union Trust company again insisted that, if the Theosophical Society was held not to be a religious organization, the rights conferred upon it by the Federal Constitution would be violated. The Supreme Court of Florida nevertheless held the entire Porter trust to be invalid, and its opinion discloses that the real ground of its decision was that the Theosophical Society, as well as the other trust beneficiaries, were not charitable organizations.

2. The Theosophical Society is an organization devoted to teaching the relationship between man and his Creator, and to the obligations of reverence and conduct which this relationship imposes upon man. The Society has no teachings or practices which violate the law or public morals. On the contrary, it teaches observance of the highest standards of ethical conduct. The Theosophical Soc-

iety is, therefore, a religious organization.

3. Under the Federal constitutional guaranty of religious freedom there is a full and free right to hold and teach any religious belief which does not violate the law or public morals. This includes the right to organize voluntary associations for religious teaching and to receive donations, by will or otherwise, without which such an organization cannot exist. The rights of the Theosophical Society as a beneficiary of the Porter trust are therefore protected by the Federal constitutional guaranty of religious freedom.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Florida, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in that Court in the consolidated cases entitled on its docket "Gardner Ives Porter, Mrs. Frank Bradford, and Mrs. Joseph McMeekin, Appellants, vs. Robert S. Baynard, as executor under the will of Ann Porter, deceased, et al., Appellees, and Gardner Ives Porter, Mrs. Frank Bradford, and Mrs. Joseph McMeekin, Appellants, vs. Union Trust Company, a corporation, as trustee, etc., et al., Appellees," and that the said judgment of the Supreme Court of Florida may be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

UNION TRUST COMPANY, a corporation, as trustee under Paragraph Nineteenth of the will of Ann Porter, deceased,

BY: J. E. BRYAN
its President.

FRANK M. HARRIS
HAROLD A. KOOMAN
Counsel for Union Trust Company, as trustee aforesaid.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The opinion of the Supreme Court of Florida, here involved has not yet been reported. The opinion was rendered on October 11, 1946 and a petition for a rehearing was denied on November 21, 1946. The opinion appears in the Transcript of Record at pages 413 through 426, although pages 423 to 425 discuss a question not material to the instant petition.

STATEMENT OF CASE

A statement of this case has been made in the attached petition for a writ of certiorari under the heading "Short Statement of Matter Involved." See pages 1 through 11, supra.

SPECIFICATION OF ERRORS

1. The decision of the Supreme Court of Florida invalidating the Porter trust on the ground that the trust violates the rule against perpetuities is necessarily based upon a finding that the Theosophical Society is not a religious organization, and the Theosophical Society has thereby been deprived of its liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. Petitioner asserted before the Supreme Court of Florida that a reversal of the Circuit Court determination that the Theosophical Society was a religious organization

would violate the Federal constitutional guaranty of religious liberty. The Supreme Court of Florida ruled that the Porter trust was invalid because it violated the rule against perpetuities. This ruling was necessarily predicated upon a finding that the Theosophical Society was not a religious organization. The Federal constitutional guaranty of religious liberty has thereby been violated. The possible non-Federal grounds for the decision of the Supreme Court of Florida are so clearly untenable and without support as to establish that the decision was in fact based upon the ground that the Theosophical Society and the other trust beneficiaries are not charitable organizations.

2. The Theosophical Society is a religious organization because it is devoted to teaching the relationship between man and his Creator and the obligations of reverence and conduct which that relationship imposes upon man, and because it has no teachings or practices which violate law or public morals but, on the contrary, teaches observance of the highest standards of ethical conduct.

3. The rights of the Theosophical Society as a beneficiary of the Porter trust are protected by the Federal constitutional guaranty of religious liberty because that guaranty includes the right to organize voluntary associations for religious teaching and to receive donations, by will or otherwise, without which such an organization cannot exist.

ARGUMENT

THE FEDERAL QUESTION HERE INVOLVED WAS PRESENTED TO THE SUPREME COURT OF FLORIDA AND DECIDED ADVERSELY TO PETITIONER

Shortly after the death of Ann Porter and the probate of her will, the Union Trust Company, as trustee under the will, brought suit in the Circuit Court of Pinellas County, Florida, under the declaratory judgments statutes of that State, to determine the effect of the direction in Paragraph Ninetenth of the will to add one half of the trust income to principal in perpetuity. The suit was made necessary by the fact that two prior decisions of the Supreme Court of Florida (Pelton v. First Trust & Savings Bank, 98 Fla. 748, 124 So. 169 and Patillo v. Glenn, 150 Fla. 73, 7 So. (2nd) 328) construing identical trust provisions were hopelessly irreconcilable. Authority to represent trust beneficiaries in such actions is conferred upon trustees by Florida Statutes, 1941, Sections 63.08, 63.12, and 87.04, as amended.

In its bill of complaint, the Union Trust Company alleged that each of the charitable organizations and purposes named as a beneficiary of the trust were charitable organizations and purposes. (81) The answer of the defendants Porter, Bradford, and McMeekin, raised the question whether the trust beneficiaries were private or charitable organizations. (81-82) As the Circuit Court found, these defendants thereafter "strenuously contended" that the Theosophical Society was not a religious organization. (390) The Union Trust Company, with equal insistance, asserted that the Theosophical Society

was a religious organization. Substantially more than half of the record in the Circuit Court consisted of testimony and exhibits on this question.

But the Union Trust Company also insisted, in the Circuit Court, that, if the Theosophical Society was held not to a religious organization, the Federal constitutional guaranty of religious liberty would be violated. This constitutional right was not raised by a Union Trust Company pleading in the Circuit Court because it could not be so raised. The right became involved only after the defendants' answer had questioned the religious nature of the Theosophical Society. The Union Trust Company could not then raise the Federal constitutional question by reply because a reply is permitted under Florida equity practice only where the answer contains a counterclaim. Florida Statutes, 1941, Section 63.37. It would have been improper for the Union Trust Company to have raised the question in its bill of complaint by way of anticipating a defense. Loeb v. Trustees, 179 U. S. 472, 45 L. ed. 280.

However, the Union Trust Company did raise the Federal constitutional question in oral argument before the Circuit Court. With reference to this question, the final decree of the Circuit Court contains this finding: —"The trustee has insisted that, if the Theosophical Society was held not to be a religious organization, the Florida and Federal constitutional guarantees of religious liberty would be violated. * * * However, in view of the ruling of this Court that the Theosophical Society is a religious organization, it is not necessary to pass upon the constitutional question so raised." (391)

The final decree of the Circuit Court upheld the validity of the Porter trust in every respect. The defendants

Porter, Bradford and McMeekin appealed to the Supreme Court of Florida from this decree. (400-401) One of their assignments of error was that the Circuit Court erred in finding that the beneficiaries of the Porter trust were charitable organizations. (403)

Under Florida appellate practice, the only document which an appellee may file in the Supreme Court of that State is his brief. Therefore, in that Court, as in the Circuit Court, the only way by which the Union Trust Company could raise the Federal constitutional question was in its brief and oral argument. That the Union Trust Company did raise the constitutional question in this manner appears from a copy of eight pages of the brief filed by it in the Supreme Court of Florida hereto attached and marked Exhibit "A". (See pages 47 through 54, infra)

The Union Trust Company therefore submits that the Federal constitutional question here involved was properly and adequately presented to the Supreme Court of Florida within the rule stated by this Court in Manhattan Ins. Co. v. Cohn, 234 U. S. 123, 58 L. ed. 1245; People v. Zimmerman, 278 U. S. 63, 73 L. ed. 184; and Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 86 L. ed. 1090.

The Union Trust Company next submits that the Supreme Court of Florida did decide the Federal constitutional question adversely to it.

One of the two principal issues before the Florida courts in this case was whether the beneficiaries of the Porter trust, and particularly the Theosophical Society, were charitable organizations and purposes. With reference to

this issue, the opinion of the Supreme Court of Florida contains the following statement: (420-421)

"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself if it is so described as to show that it is charitable in its nature. Jordan v. Landis, Att'y Gen'l., 128 Fla. 604, 175 So. 241. A definite definition of charity is well nigh impossible to frame. The courts should be left free to apply the standards of the time—on the theory that what may be charitable in one generation may be non-charitable in a later age, and vice-versa. Ideas regarding social benefits and public good change from century to century and vary in different communities. It must expand with the advancement of civilization and the daily increased needs of man. Bogart on Trusts and Trustees, Vol. 2, p. 1129.

"Charities, in a broad sense, are either public or private. A public charity is one in which the public at large or some undetermined portion of it, has a direct interest or property right or which the beneficiaries cannot be ascertained with certainty. 14 C. J. S. 415. A gift or bequest for the benefit or aid of defined persons is not in general a public charity but a private trust only. 14 C. J. S. 416. While the general rule is that in order that a gift shall possess such certainty as will give it validity, the language must require that the fund shall be expended for charity and for nothing else. 10 Am. Jur. 595-6; Hadley v. Forsee, 203 Mo. 418, 101 S.W. 59, 37 L. R.A. (NS) 49.

> The fundamental distinction between 'private trust' and 'charitable trust' is that in the case of a private trust property is devoted to the use of specified persons who are designated as beneficiaries of the trust, whereas in the case of charitable trusts property is devoted to purposes beneficial to the community. Old Ladies' Home Ass'n v. Grubbs' Estate, 191 Miss. 250, 2 So. (2d) 593.
>
> "The principal reason for deciding whether a given trust is charitable or not is to determine the period of enjoyment of the described property. If the trust is dominately charitable, then its perpetual character is not a vice under the law, but, on the other hand, if the trust is dominately private, then its period of enjoyment is limited to no longer than lives in being when the trust started and twenty-one years thereafter plus the period of gestation. Bogart on Trusts and Trustees, Vol. 1, par. 218; Vol. 2, par. 352.
>
> "The conclusions having been reached that the creation of the Porter-Genau Memorial Fund in perpetuity violates the common law rule against perpetuities and our former adjudications, then a pertinent question arising on the record is viz, what is the legal effect of the invalid provision of paragraph 19 on the charitable provision of the same paragraph, and arguendo, conceding that the charity provision is public in character."

In concluding its opinion, the Supreme Court of Florida again states: (425)

> "We have reached the conclusion in the case at bar that paragraph 19 offends the rule against perpetuities and our previous adjudications."

Since, by the Court's own reasoning, a charitable trust cannot violate the rule against perpetuities, and since the Court emphatically held that the Porter trust did violate

the rule against perpetuities, the Court, by necessary implication, held that the beneficiaries of the Porter trust, including the Theosophical Society, were not charitable organizations and purposes. It is impossible to avoid this conclusion.

The omission of the Court to expressly state that the Theosophical Society was not a religious organization is significant and material to the question raised by the instant petition.

The attack upon the religious nature of the Theosophical Society in this case included a strong appeal to prejudice and intolerance.

Typical of this appeal to prejudice was the introduction in evidence by the defendants of photographs of Morya and Koot Hoomi, two teachers of the doctrines upon which Theosophy is based. One of these teachers is a Rajput of Northern India and the other a Sikh of Northern India. (125-126, 84) The photographs, of course, show that these teachers are not members of the white race. (466A-466B) The photographs could have no possible bearing upon the merits of the case. Their introduction in evidence was a transparent appeal to racial prejudice in a section of the country where it was hoped that such an appeal would be most effective.

Also typical of the methods used in attacking the religious nature of the Theosophical Society is the following statement of counsel for the defendants Porter, Bradford, and McMeekin made in answer to a petition for a rehearing filed by the Union Trust Company in the Supreme Court of Florida: (454-455)

> "Do they still claim that the Theosophical Society is a religious organization? This, in spite of the

fact that the highest judicial authorities of Massachusetts (cradle of religious freedom) holding it was not a charitable religious organization, but could be dignified at most as 'a cult of speculative Theosophy'. Judge Reaves (one of the respondents' attorneys) in oral argument before this Court aptly called it 'atheism of the rankest kind.' We are not unmindful of the claim made by the deponent-clever spokesman for the Theosophical Society — that there was a rift in the Society and a separation into factions, one accusing the other of over-emphasizing that their individual members possessed of 'occult powers in continuing form of manifestation as astrologers, the socerer, the charlatan, the mind reader, the crystal gazer or worker of magic in legerdemain and what not.' The other faction in turn being accused by its opposing Theosophical faction of promoting and maintaining a racket for fleecing estates of deceased persons who, while living, had been prevailed upon and opportuned to be made beneficiaries in wills for the obvious purpose of maintaining and keeping a country estate for a few of its privileged members (Covina, California faction). We are mindful of the remark of the nisi prius Judge, who, having before him in argument opposing to each other two members of his local bar, with general reputations for truth and veracity of the lowest ebb, when in acrimonous argument accused each other of being a prevaricator and a liar, silenced them with the remark, 'Stop, gentlemen, this Court is not interested in admitted matters only disputed facts.' Likewise we are willing to accept as true the accusations of the two factions of the Theosophical Society, one against the other."

When the Union Trust Company filed a motion to strike the accusation that the Theosophical Society was "maintaining a racket for fleecing estates of deceased persons" for the purpose of "keeping a country estate for a

few of its privileged members," on the ground that the accusation was not supported by the record but was, on the contrary, affirmatively shown by the record to be untrue, (459-461) the Supreme Court of Florida, instead of indicating its disapproval of defendants' counsel making statements of fact not found in the record, entirely ignored the motion to strike and denied a rehearing. (461-462)

In view of this appeal to prejudice, it is regrettable that the Supreme Court of Florida did not make an express finding as to the nature of the Theosophical Society. It seems quite clear that, under the decisions of this Court, the Theosophical Society is a religious organization. The Federal constitutional question was clearly presented to the Supreme Court of Florida. An express finding by that Court that the Theosophical Society was not religious would have made the issue clear for determination by this Court. The omission of such an express finding has the opposite effect.

As previously stated, 265 of a total of 502 pages in the record of this case consists of testimony and exhibits with reference to the religious nature of the Theosophical Society. The question was also fully discussed in the oral arguments and briefs of counsel in the Florida courts. It was a serious issue in the case. Rule 19 of the rules governing judges, adopted by the Supreme Court of Florida on January 27, 1941, provides that, "in disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, (and) avoids the suspicion of arbitrary judgment." Petitioner submits that this rule required the Supreme Court of Florida to decide, expressly rather than by implication, the religious

nature of the Theosopical Society, particularly since the case involved a Federal constitutional question which might be reviewed by this Court.

The non-Federal grounds advanced by the Supreme Court of Florida for its decision are so unfounded as to come within the rule that they may be regarded "as essentially arbitrary or a mere device to prevent the review of a decision upon the Fedral question." McCoy v. Shaw, 277 U. S. 302, 72 L. ed. 891.

Reference has already been made to the Court's statements that the trust might be invalid because, in the Court's opinion, Mrs. Porter's dominant motive was not charitable but to create a memorial. (418, 420) That a charitable trust should be held invalid on this ground is so unsound that it is difficult to believe that the Supreme Court of Florida intended this as one of the grounds of its decision.

The innumerable charitable institutions in this country which bear the name of some person whose memory the donor wished to perpetuate and which are supported by perpetual trusts and endowments seem a sufficient answer to any contention that a trust cannot be charitable if it also serves as a memorial. But the argument that a charitable trust is to be tested by the motive of the donor, rather than the use to be made of the trust funds, has been eloquently answered in Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553, as follows:

> "How many of our noblest and most useful public charities would stand such a test? How many donations to public charities are made out of pure love to God and love to man, free from the stain or taint of every consideration that is personal, private, or selfish? Who can say that the millionaire who

> founds a hospital or endows a college, and carves his name thereon in imperishable marble, does so from love to God and love to his fellow, free from the stain of selfishness? Yet, is the hospital or the college any the less a public charity because the primary object of the founder or donor may have been to gratify his vanity, and hand down to posterity a name which otherwise would have perished with his millions? * * It would be as vain as it would be unprofitable for a human tribunal to speculate upon the motives of men in such cases. Nor is it necessary for any legal purpose. The money which is selfishly given to public charity does as much good as that which is contributed from a higher motive, and in a legal sense the donor must have equal credit therefor."

The Supreme Court of Florida further attempts to support its decision in this case by its own prior decision in Pelton v. First Trust & Savings Bank, 98 Fla. 124 So. 169. In the Pelton case, the testator directed that one half of the income from a trust created under his will be paid annually to the Hillsborough County Humane Society in perpetuity, and that the other half of the income be added to the trust principal in perpetuity. The Supreme Court of Florida held that one-half of the trust income should be paid to the Humane Society in perpetuity, but that the provision for accumulating the remainder of the trust income was invalid. The Court went on to hold that the decedent's widow, as his sole heir, was entitled to the second half of the trust income for her life, and that the disposition of the second half of the trust corpus was a matter for equitable adjudication, apparently upon the death of the widow.

In the Pelton case, the Court did not hold that the widow was entitled to the one-half of the trust principal from which her life income was derived. Nor did it hold

that the Humane Society was not entitled to the second half of the trust corpus upon the death of the widow. That the Court refrained from making either of these rulings clearly indicates that the widow was not entitled to half of the trust corpus, for, if she had been, there would have been no reason to limit her to a life estate in that half of the corpus. And, since the Humane Society was the only other possible claimant of this half of the trust corpus, and since its claim was left for future "equitable adjudication," the Pelton case, to say the least, indicates that the claim of the Humane Society might have been given favorable consideration after the death of the widow.

Yet the Supreme Court of Florida cites the Pelton case as supporting its decision in the instant case and makes the following statement of its decision in the Pelton case: (418-419)

> "The case of Pelton v. First Savings & Trust Co., of 98 Fla. 478, 124 So. 169, involved a will which provided that after certain bequests were satisfied, one-half of the entire net income arising therefrom should be paid quarterly to the Hillsborough County Humane Society at the discretion and under the supervision of the executor, while the remaining one-half of the income arising from the estate should each year be added to and become a portion of the corpus of said estate. We held that the one-half of the annual income accumulated from year to year and added to the corpus of the estate, indefinitely, offended the rule of perpetuity. We pointed out that the will provided for an unlawful accumulation in perpetuity of this one-half of the income, although vested in the trustee, and the testator having failed to name a beneficiary, *we could not sustain or uphold the devise because it violated the perpetuity rule enunciated in previous holdings.*"

The Court thus states that it could not "sustain or uphold the devise" in the Pelton case. The Court ignores the fact that, in the Pelton case, it did specifically uphold half of the devise and that the only part of the devise which it specifically held ineffective was a life estate in one half of the income. And it is questionable whether the Court's incorrect statement of its decision in the Pelton case was negligently made because the Circuit Court decree which the Supreme Court reversed contained the same analysis of the Pelton case as is given above, (387-389) and it is fair to assume that the Supreme Court of Florida read the decree which it reversed.

In its decision in the instant case, the Supreme Court of Florida also disregarded its own prior decision in Patillo v. Glenn, 150 Fla. 73, 7 So. (2nd) 328, and the unanimous decisions in other states that a provision for the addition of part of the income to the principal of a vested trust for charity does not invalidate the trust but will be permitted to operate under the supervision of a court of equity so as to prevent an unreasonable accumulation.

In the Patillo case, the testator created a perpetual charitable trust and directed that the income from the trust be loaned at 5% interest to assist worthy boys and girls in obtaining an education. This trust thus required the perpetual accumulation of both the entire trust income and the 5% interest on income loaned. But the Supreme Court of Florida held the trust valid, saying that "such provisions establish a valid and operative charitable trust that may be administered under the continuing control and direction of a court of equity to the end that the purpose of the testator may be accomplished."

The decisions in other states than Florida all hold that a provision for the addition of part of the trust income to

the principal of a vested charitable trust (as distinguished from a trust where the accumulation is a condition precedent to vesting) will not invalidate the trust. This appears from the final decree of the Circuit Court herein (384-386) and from the following quotation from Simes on Future Interests, Volume 2, Section 591:

> "Charities are favored by the court. The charitable trust is subject to the directions of the court of equity; and, if the accumulation should become unreasonable, the court has power to direct the trustee to disregard it. Thus the charitable trust will be sustained, and objectionable features will be prevented by the control of the court. *No American cases have been found where a provision for an accumulation for charity has been held void.*"

The decision of the Supreme Court of Florida herein does not mention the Patillo case or the decisions of other state courts on this question. Again it is questionable whether this omission was the result of negligence, for the final decree of the Circuit Court contains a complete statement of the Patillo case and a summary of the decisions in other states. (386-387)

There is thus no more legal foundation for a ruling that the Porter trust is invalid because of the provision for accumulating income than there is for a ruling that the trust is invalid because the testator intended it as a memorial. Consequently, the asserted non-Federal grounds of the decision of the Supreme Court of Florida are absolutely untenable and entirely without support. It is quite clear that the actual ground of decision was that the Theosophical Society and other trust beneficiaries were not charitable organizations.

Under circumstances such as these, this Court has repeatedly held that it will take jurisdiction and review the state court decision.

The applicable rule is stated in Williams v. Kaiser, 323 U. S. 471, 89 L. ed. 398, as follows:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. * * * (citing cases) And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. * * * (citing cases) We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the State Court based its judgment on the law raising the Federal question, and this court will then take jurisdiction'."

And in McCoy v. Shaw, 277 U. S. 302, 72 L. ed. 891, this Court further held that, where a state court decision is based upon both a Federal and non-Federal ground, it will nevertheless take jurisdiction where "the non-Federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the Federal question."

A case in point is Abie State Bank v. Bryan, 282 U. S. 765, 75 L. ed. 690. In that case a Nebraska Bank Guaranty Law was attacked as violating the due process clause of the Federal Constitution. The Nebraska Supreme Court held that the plaintiffs were estopped from attacking the law because they had previously accepted benefits

under it. It was therefore claimed that a decision of the Nebraska court upholding the law was supported by an adequate non-Federal ground and that this Court was without jurisdiction to review the case. However, this Court held that the Bank Guaranty Law was a police regulation which, though valid when made, might become invalid by reason of subsequent conditions, and that the plaintiffs could not be estopped, by prior compliance with the law, from subsequently questioning its validity on this ground. It was therefore held that the asserted non-Federal ground of the state decision was without foundation, and this Court took jurisdiction, saying:

> "But, the Federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-Federal ground, to ascertain for itself, in order that constitutional guaranties may be appropriately enforced, whether the asserted non-Federal ground independently and adequately supports the judgment. * * * The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable. And we perceive no basis for a different rule because the regulation was extolled while being obeyed. We conclude that the constitutional question was properly raised and was decided, and that the judgment under review is not supported by an independent and adequate non-Federal ground. Hence, the appeal was properly brought."

In the cited case, it was held that the asserted non-Federal ground, that is, estoppel to attack the validity of a police regulation because of subsequent events, was unfounded in fact and law. So as in the case at bar, the assert-

ed non-Federal ground that the Porter trust is void because of the accumulation provision is unfounded in law.

Another case in point is Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102. In that case, an individual taxpayer claimed that a Mississippi income tax law denied him the equal protection of the laws because he was taxed on income from activities outside the state while an amendment to the law exempted Mississippi corporations from taxation on such income. The Supreme Court of Mississippi denied relief, saying that it was unnecessary to pass upon the Federal question because, if the amendment was valid, the individual taxpayer could not complain and, if the amendment was invalid, the individual was still subject to the tax because, under the statute prior to the amendment, individuals and domestic corporations were taxed alike. It was contended that this Court was without jurisdiction because the Mississippi decision was supported by an adequate non-Federal ground. But this Court held to the contrary, saying:

> "Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. * * * (citing cases) If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well as by the refusal of the state court to decide the question, as by an erroneous decision of it, * * * (citing cases) for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked. The burden does not rest on him to test again the validity of the amendment by

> some procedure to compel his competitors to pay the tax under the earlier statute. * * * (citing cases) We therefore conclude that the purported non-Federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question."

The analogy between the cited case and the case at bar is clear. In each, a point of law advanced as a non-Federal ground supporting a state court decision is unsubstantial and without support.

In Terre Haute R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, it appeared that the Supreme Court of Indiana based its decision, in a case involving a Federal constitutional question, upon its construction of a railroad charter. This Court held the state court's construction of the charter to be so untenable that, as a non-Federal ground, it was insufficient to support the judgment. This Court therefore took jurisdiction, saying:

> "The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

Also analogous is Ward v. Love County, 253 U. S. 17, 64 L. ed. 751, in which certain Indians sued to re-

cover county taxes on Oklahoma land on the ground that a Federal statute made the lands tax exempt. The Supreme Court of Oklahoma denied relief on the ground that the taxes had been voluntarily paid and because there was no statutory authority in Oklahoma for the recovery of taxes so paid. It was claimed that this Court was without jurisdiction because the Oklahoma decision rested on a non-Federal ground. But this Court took jurisdiction because the non-Federal ground was without fair or substantial support. The Court said:

> "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the Supreme Court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support. * * * (citing cases) Of course, if non-Federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767. With this qualification, it is true that a judgment of a state court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof.
>
> "The facts set forth in the petition, all of which

> were admitted by the demurrer whereon the county elected to stand, make it plain, as we think, that the finding or decision that the taxes were paid voluntarily was without any fair or substantial support."

Other decisions in which the same principle has been applied are Creswell v. Grand Lodge, 225 U. S. 246, 56 L. ed. 1074; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 57 L. ed. 662; Ancient Egyptian Order v. Michaux, 279 U. S. 737, 73 L. ed. 931; and Broad River Power Co. v. South Carolina, 281 U. S. 537, 74 L. ed. 1023. And in Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, it was said that, if "it is apparent that a Federal question is sought to be avoided or is avoided by giving an unreasonable construction to pleadings," this Court will not refuse to take jurisdiction. The same rule should certainly apply where, as in the case at bar, the court has unreasonably disregarded its own prior decisions.

Petitioner therefore, respectfully submits that the asserted non-Federal grounds for the decision of the Supreme Court of Florida herein are utterly untenable and without support and that the decision is in fact based upon the ground that the Theosophical Society and the other trust beneficiaries are not charitable organizations.

THE THEOSOPHICAL SOCIETY IS A RELIGIOUS ORGANIZATION

Since, under the law, a perpetual trust is invalid unless it is for the advancement of some charitable purpose such as religion, education, or the relief of poverty, the defendants Porter, Bradford, and McMeekin contended, in the Florida courts, that the Theosophical Society was not a religious organization and that the Porter trust was invalid to the extent that it was for the benefit of the Theo-

sophical Society. The Circuit Court ruled that the Theosophical Society was a religious organization. (390-391) The Supreme Court of Florida reversed this ruling. (421, 425-426)

A summary of the organization and teachings of the Theosophical Society has already been given. See pages 4-5, infra. The following is a part of the additional evidence contained in the record with reference to the nature of the Theosophical Society:

The motto of the Theosophical Society is: — "There is no religion higher than truth." Truth has been defined by one of those whose teachings inspired the formation of the Theosophical Society as follows: (86)

> "Behold the truth before you; a clean life, an open mind, a pure heart, an eager intellect, an unveiled spiritual perception, a brotherliness for one's co-disciple, a readiness to give and receive advice and instruction, a loyal sense of duty to the Teacher, a willing obedience to the behests of Truth, once we have placed our confidence in and believe that Teacher to be in possession of it; a courageous endurance of personal injustice, a brave declaration of principles, a valiant defense of those who are unjustly attacked, and a constant eye to the ideal of human progression and perfection which the Secret Science depicts — these are the golden stairs up the steps of which the learner may climb to the temple of Divine Wisdom."

In reply to a question as to whether the Theosophical Society was religious in its nature, Mr. Iverson L. Harris, chairman of the Cabinet of the Theosophical Society, testified as follows: (99-100)

> "We students of Theosophy maintain that Theosophy is not a religion but is religion itself. I know

that sounds like a rather flamboyant claim to any who have not studied our profound religious thought but a study of Theosophy confirms them in the knowledge that Theosophy really is the mother source from which all the great world religions worthy of the name stem, and when I say Theosophy I do not mean merely what is contained in the books which Mme. Blavatsky and her successors have published, but there is a mother source handed down by the traditions of all nations and all races, which finds different expressions among different peoples in different ages, and that universal spiritual, intellectual, philosophical heritage is religion per se. Theosophy is religion in this sense. * * * Now, a man's religion, in our estimation, is his link with the Divine. That is, religion in the sense that we think is worthy of the name 'religion', is not merely the acceptance of certain hard and fast articles of faith or set of dogmas. To us that is sectarianism but that is not religion. We believe that the innermost instinct in the deepest side of every man's conscience is his awareness of his link with God. * * * In other words, Theosophy is essentially a religion in the sense that it is the means and way, and the teaching, the doctrine, the discipline which helps people to become at one with their own inner God."

As to whether Theosophy is predicated upon the existence of a God or Supreme Being, Mr. Iverson L. Harris further testified: (104)

"Our view is that any defining or limitation of the God head is inconsistent with its being boundless and infinite and, therefore, we prefer to designate the Supreme in the way the Hindus do referring to it, as either Parabrahman, which means beyond God, or simply that which has no attributes and no limitations and is simply beyond the scope of any finite mind to understand. We will not limit our conception of God by any personal attributes."

There are two fundamental doctrines of Theosophy which are accepted by most of the members of the Theosophical Society. These are the doctrines of Karman and reincarnation. They were explained by Mr. Iverson L. Harris as follows: (95-96)

> "I think that the two doctrines that are most universally accepted by members of the Theosophical Society and the two doctrines with which, perhaps, the Theosophical Society is most identified in the public mind among serious people who take the trouble to investigate, are what we call the twin doctrines of Karma, or more scholarly spelled Karman, and reincarnation.
>
> "The word Karma comes from a Sanskrit root Kri, meaning to do; in other words, Karman means action. It is known in Theosophy as the law of cause and effect or the doctrine of consequences. * * * More specifically, the doctrine of Karma, according to Theosophy, follows: That every thought that we think, every word that we speak, every act that we do, every emotion that we entertain, releases a force of some kind, be it physical or mental, psychical spiritual or what not, and this force acts on the surrounding milieu or atmosphere and Nature reacts on the one that set the force in motion. In other words, our doctrine of Karman is Newton's third law of motion applied not merely to the physical plane but to the moral and spiritual planes as well. In other words, to every action there is an equal and opposite reaction. That is our doctrine of Karman.
>
> "***We understand that each one of us is our own Karma, that what we are at any moment of our existence is the net result of all we have ever thought and felt and done in the past, either in this life, or in some previous life or lives, and that each moment of our lives we choose how we shall react to the Karma of the past, and thus we set in motion new causes which will determine what we shall be in the future.

"Obviously, all the consequences we are suffering now in this one life time cannot possibly be the fruit of seeds sown in this lifetime. Obviously, also everything we had sown in any one lifetime cannot reap its full fruition and be harvested in any one lifetime, and that is where the twin doctrine of reincarnation comes in to explain the apparent injustices of life and to give scope for the logical fulfillment of the doctrine of Karma."

In further explanation of the Theosophical doctrine of reincarnation, Mr. Iverson L. Harris testified as follows: (180)

"Reincarnation continues on this earth until all the lessons that this earth has to teach have been learned, and then the immortal ego, as we call it, the soul, moves on to higher planes with one exception, and that is that in the case of what we call a Buddha of Compassion, a Christ. Those great Saviors frequently refuse to move on to higher planes and of their own choice remain in incarnate existence in order to help their fellow men, and that is what most Theosophical students understand by the Christian doctrine of vicarious atonement."

As to the relationship between Theosophy and ethical conduct, the testimony of Mr. Iverson L. Harris was as follows: (101)

"Ethics and moral principles are the very heart and core of any religion or religious philosophy worthy of the name, because without high moral and ethical principles it is impossible in our estimation to comprehend the deeper spiritual verities. * * * We believe it is absolutly essential that a high ethical and moral life be pursued in order that one can open his mind and become, in some degree at any rate, a channel for high spiritual powers and knowledge to flow through him."

The main activity of the Theosophical Society is, of course, the teaching of the beliefs, doctrines, and principles which have been outlined in the testimony above quoted. This teaching is carried on through lectures, discussions at lodge meetings, correspondence courses, the publication and dissemination of books, magazines, and pamphlets, and through the Theosophical University. The Theosophical University is incorporated under the laws of California and is authorized to grant the standard academic degrees as well as degrees in Theosophy. The corporation has no members and all of its trustees are members of the Theosophical Society. It is in reality an educational instrumentality of the Society for the purpose of training teachers of Theosophy. (109-111)

It is apparent from the foregoing proofs that Theosophy, as defined and taught by the Theosophical Society, deals with the nature of the Supreme Being which pervades the universe, the relationship between man and this Supreme Being, and the obligations of ethical conduct which this relationship imposes upon man. It is also apparent that the principal activity of the Theosophical Society is the teaching of its beliefs and doctrines with reference to these matters. It is submitted that, on these facts, the Theosophical Society is a religious organization.

In Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, this Court defined "religion" as follows:

> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter."

The beliefs, doctrines, and teachings of the Theoso-

phical Society are certainly religious within the meaning of the foregoing definitions.

It is fundamental that an organization need not be a Christian organization in order to be a religious organization within the meaning of the law. Minersville School Dist. v. Gobitis, 310 U. S. 586, 84 L. ed. 1375; American Law Institute Restatement of the Law of Trusts, Section 371, note. As this Court, in Follett v. McCormick, 321 U. S. 573, 88 L. ed. 938, held, "the protection of the First Amendment is not resticted to orthodox religious practices any more than is it to the expression of orthodox economic views."

Petitioner submits that, upon the facts and the law, the Theosophical Society is a religious organization.

THE RIGHTS OF THE THEOSOPHICAL SOCIETY AS A BENEFICIARY OF THE PORTER TRUST ARE PROTECTED BY THE FEDERAL CONSTITUTIONAL GUARANTY OF RELIGIOUS LIBERTY

Religious freedom is protected by the Federal Constitution against state action. The First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment to the Federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." This Court has held that the liberty guarantied by the Fourteenth Amendment includes religious freedom, as defined in the First Amendment, and that the Fourteenth Amendment makes the provisions of the First Amendment applicable to the

states. Murdock v. Pennsylvania, 319 U. S. 105, 319 L. ed. 105; Cantwell v. Connecticut, 310 U. S. 296, 84 L. ed. 1213. The restrictions of the Fourteenth Amendment apply to all state action, whether legislative, executive, or judicial. Brinkerhoff v. Hill, 281 U. S. 673, 74 L. ed. 1107; Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791. Therefore, since religious freedom is protected by the Federal Constitution against state action, whether judicial or otherwise, the action of the Florida courts with reference to the Theosophical Society in this case is subject to the limitations of the Federal Constitution.

As to the extent and scope of the constitutional guaranty of religious liberty, this Court, in Watson v. Jones, 80 U. S. 679, 20 L. ed. 666, has held:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."

In the instant case, there is no contention that the Theosophical Society teaches or advocates any practices which violate law or morality. On the contrary, the testimony shows without question that the Society advocates strict obedience to law and observance of the highest standards of moral and ethical conduct. As a matter of fact, every person becoming a member of the Theosophical Society is required to promise to obey the laws of the country in which he lives. (95-101, 105)

But religious freedom includes, not only the right to believe, but also the right to act, that is, the right of persons to organize into voluntary associations for religious

teaching and worship, and for the purpose of disseminating the doctrines of the group.

As stated by this court in Cantwell v. Connecticut, 310 U. S. 296, 84 L. ed. 1213:

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, — freedom to believe and freedom to act."

In Watson v. Jones, 80 U. S. 679, 20 L. ed. 666, it was further held:

> "The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine * * is unquestioned."

And in Minersville School Dist. v. Gobitis, 310 U. S. 586, 84 L. ed. 1375, this Court said:

> "Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief — or even of disbelief in the supernatural — is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting-house."

Of course, the right to organize voluntary associations for religious teaching and worship and for the dissemination of religious doctrines would be meaningless unless

such associations were also permitted to raise funds by any lawful means.

As stated by this Court in Murdock v. Pennsylvania, 319 U. S. 105, 87 L. ed. 1292, wherein it was held that a member of Jehovah's Witnesses who sold religious tracts was not subject to a municipal license tax imposed on persons soliciting funds:

> "It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."

In the foregoing case, this Court recognized the vital relationship between religious freedom and the right of a religious organization to raise funds by any legitimate means.

Another applicable decision on this question is Follett v. McCormick, 321 U. S. 573, 88 L. ed. 938. In that case it appeared that the town of McCormick, South Carolina, had an ordinance requiring the payment of a license tax by "agents selling books." A member of Jehovah's Witnesses, who was an ordained minister of that organization, made his living by selling within the town by house to house canvassing, certain books which were religious in their nature. The Supreme Court of South Carolina held that the minister was subject to the town license tax. In reversing this decision, and in holding that the imposition of a license tax upon a member of a religious organization selling religious literature infringed upon the constitutional guaranty of religious freedom, this Court said:

"Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a 'free exercise' of their religion when they enter the pulpit to proclaim their faith. The Priest or preacher is as fully protected in his function as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early 'taxes on knowledge' which the framers of the First Amendment sought to outlaw. * * * But if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. For we fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views."

Plaintiff submits that the principle of Follett v. McCormick, supra, is applicable to the case at bar. If the Federal constitutional guaranty of religious freedom protects a religious organization and its members in their right to derive income from the sale of books without being subjected to a license tax, then certainly that constitutionl guaranty also protects the Theosophical Society in its right to receive contributions by will or otherwise from its members or other interested persons. The fundamental right in each case is the same, that is, the right to receive, from any lawful source, income necessary to exist as an organization.

In conclusion, therefore, it is submitted that, since the Theosophical Society is an organization engaged in the study and teaching of religion, and since none of its teachings or practices violate the law or public morals, it is protected in its right to receive income as a beneficiary of the Porter trust by the Federal constitutional guaranty of religious liberty.

CONCLUSION

For the reasons and upon the authorities above set forth, it is respectfully submitted that this Honorable Court should issue a writ of certiorari and that the decision of the Supreme Court of Florida herein should be reversed.

FRANK M. HARRIS
HAROLD A. KOOMAN
Counsel for petitioner
Union Trust Company,
as trustee.

EXHIBIT "A"

Copy of pages 49 through 56 of brief filed by Union Trust Company, as trustee, in Supreme Court of Florida in consolidated cases entitled "Gardner Ives Porter, et el., Appellants, vs. Union Trust Company, as trustee, et al., Appellees, and Gardner Ives Porter, et al., Appellants, vs. Robert S. Baynard, as executor, et al., Appellees."

THE RIGHTS OF THE THEOSOPHICAL SOCIETY AS A BENEFICIARY OF THE PORTER TRUST ARE PROTECTED BY THE FLORIDA AND FEDERAL CONSTITUTIONAL GUARANTIES OF RELIGIOUS LIBERTY

In the Circuit Court, the appellee Union Trust Company, as trustee, insisted that, if the Theosophical Society was held not to be a religious organization, the Florida and Federal guaranties of religious liberty would be violated. In his final decree in this cause, Judge Hobson stated that, since he was holding the Theosophical Society to be a religious organization, it was unnecessary for him to pass upon the constitutional questions so raised. (342)

If Judge Hobson's ruling as to the religious nature of the Theosophical Society is affirmed by this Court, then, of course, the constitutional questions raised in the Circuit Court require no determination here. But, the appellee Union Trust Company, as trustee, submits that a reversal of Judge Hobson's ruling with reference to the nature of the Theosophical Society would violate the Florida and Federal constitutional guaranties of religious liberty.

The applicable provisions of the Florida Constitution are Sections 5 and 6 of the Declaration of Rights, which provide as follows:

> "DECLARATION OF RIGHTS, SECTION 5. The free exercise and enjoyment of religious profession and worship shall forever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed as to justify licentiousness or practices subversive of, or inconsistent with, the peace or moral safety of the state or society.
>
> "DECLARATION OF RIGHTS, SECTION 6. No preference shall be given by law to any church, sect, or mode of worship * * *."

Religious freedom is also protected by the Federal Constitution against state action. The First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment to the Federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Supreme Court of the United States has held that the liberty guaranteed by the Fourteenth Amendment includes religious freedom, as defined in the First Amendment, and makes the provisions of the First Amendment applicable to the states. Murdock v. Pennsylvania, 319 U. S. 105, 319 L. ed. 105; Cantwell v. Connecticut, 310 U. S. 296, 84 L. ed. 1213. The restrictions of the Fourteenth Amendment apply to all state action, whether legislative, executive, or judicial. Brinkerhoff v. Hill, 281 U. S. 673, 74 L. ed. 1107; Mooney v. Holohan,

294 U. S. 103, 79 L. ed. 791; State v. Woodruff, 134 Fla. 437, 184 So. 81. Therefore, since religious freedom is protected by the Federal Constitution against state action, whether judicial or otherwise, the action of the Florida courts with reference to the Theosophical Society in this case is subject to the limitations of the Federal Constitution.

Authorities previously discussed in this brief establish that the constitutional guaranties of religious freedom are not restricted to the Christian religion. The next pertinent question is the extent and scope of the religious freedom which is so guaranteed.

First, it will be noted that religious freedom may be restricted only where it interferes with law or public morals. This is expressly stated in Section 5 of the Declaration of Rights of the Florida Constitution, supra.

In addition, the Supreme Court of Florida, in State v. Woodruff, 153 Fla. 84, 13 So. (2nd) 704, after citing numerous cases, has held:

> "We approve the rule in these cases. (They) are predicated on the theory that freedom of religion and the press as guaranteed by the First and Fourteenth Amendment to the Federal Constitution and Sections Five and Thirteen, Declaration of Rights, Constitution of Florida, are absolute so long as public morals, public health, public safety and convenience are observed***."

The Supreme Court of the United States follows the same fundamental principle. In Watson v. Jones, 80 U. S. 679, 20 L. ed. 666, that Court said:

> "In this country the full and free right to entertain any religious belief, to practice any re-

> ligious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."

In the instant case there is no contention that the Theosophical Society teaches or advocates any practices which would violate law or morality. On the contrary, the testimony shows without question that the Society advocates strict obedience to law and observance of the highest standards of moral and ethical conduct. As a matter of fact, every person becoming a member of the Theosophical Society is required to promise to obey the laws of the country in which he lives. (117-120, 122, 125)

Since the Theosophical Society does not have or teach any practices which violate law or morality, its membership is protected in its beliefs and teachings by the provisions of the Florida and Federal constitutions. There remain to be considered the affirmative elements included in the constitutional guaranties.

Religious freedom includes, not only the right to believe, but also the right to act, that is, the right of persons to organize into a voluntary association for religious teaching and worship, and for the purpose of disseminating the doctrines of the group.

As stated by the Supreme Court of the United States in Cantwell v. Connecticut, 310 U. S. 296, 84 L. ed. 1213:

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any

> form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act."

In Watson v. Jones, 80 U. S. 679, 20 L. ed. 666, the same Court further held:

> "The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine * * * is unquestioned."

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> "Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief—or even of disbelief in the supernatural — is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting-house."

Of course, the right to organize religious associations for teaching and worship and for the dissemination of religious doctrines would be meaningless unless such associations were also permitted to raise funds by any lawful means.

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> "It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."

In the foregoing case the United States Supreme Court recognized the vital relationship between religious freedom and the right of a religious organization to raise funds by any legitimate means.

And, in Montgomery v. Carlton, 99 Fla. 152, 126 So. 135, this Court recognized that religious organizations could not exist without contributions. In that case, the Court said:

> "In a country like ours, where it is one of the fundamental canons of the political law that there shall be no established religion, and that government shall not actively participate in the support or dissemination of religion of any sort, all organized churches must depend upon the eleemosynary contributions of individuals."

Another applicable decision on this question is Follett v. McCormick, 321 U. S. 573, 88 L. ed. 938. In that case it appeared that the town of McCormick, South Carolina, had an ordinance requiring the payment of a license tax by "agents selling books." A member of

Jehovah's Witnesses, who was an ordained minister of that organization, made his living by selling within the town by house to house canvassing certain books which were religious in their nature. The Supreme Court of South Carolina held that the minister was subject to the town license tax. In reversing this decision, and in holding that the imposition of a license tax upon a member of a religious organization selling religious literature infringed upon the constitutional guaranty of religious freedom, the United States Supreme Court said:

> "Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a 'free exercise' of their religion when they enter the pulpit to proclaim their faith. The priest or preacher is as fully protected in his function as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early 'taxes on knowledge' which the framers of the First Amendment sought to outlaw.***
>
> "But if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. For we fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views."

A Florida decision exactly in accord with Follett v. McCormick, supra; on a similar set of facts is State v. Woodruff, 153 Fla. 84, 13 So. (2nd) 704.

Plaintiff submits that the principle of Follett v. McCormick, supra, and State v. Woodruff, supra, is applicable to the case at bar. If the Florida and Federal constitutional guaranties of religious freedom protect a religious organization and its members in their right to derive income from the sale of books without being subjected to a license tax, then certainly those constitutional guaranties also protect the Theosophical Society in its right to receive contributions by will or otherwise from its members or other interested persons. The fundamental right in each case is the same, that is, the right to receive, from any lawful source, income necessary to exist as an organization.

In conclusion, therefore, it is submitted that, since the Theosophical Society is an organization engaged in the study and teaching of religion, and since none of its teachings or practices violate the law or public morals, it is protected in its right to receive income as a beneficiary of the Porter trust by the Florida and Federal guaranties of religious freedom.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1043

UNION TRUST COMPANY, a corporation, as trustee under Paragraph Nineteenth of the will of Ann Porter, deceased,

Petitioner,

vs.

BERTHA PAULINE GENAU, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF FOR PETITIONER UNION TRUST COMPANY, AS TRUSTEE.

The petitioner herein, Union Trust Company, as trustee, submits this reply to the brief filed by counsel for the respondents Porter, Bradford, and McMeekin.

I.

The respondents contend that the Union Trust Company had no right to bring or maintain this suit because it is merely "a prospective or potential trustee." This argument is based upon a succession of fallacies.

Respondents' position is that the Union Trust Company is not a trustee under the will of Ann Porter until part or all of the property devised and bequeathed to it under the will has actually been distributed to it.

Such a contention is contrary to the fundamentals of the law of trusts. A testamentary trustee becomes such upon the death of the testator. His duties then begin. His first duty is "to take reasonable steps to take and keep control of the trust property." American Law Institute Restatement of the Law of Trusts, Section 175; Scott on Trusts, Volume 2, Section 175. Testamentary trustees must "bear in mind that the law knows no such person as a passive trustee, and that they cannot sleep upon their trust." Perry on Trusts and Trustees, Volume I, Section 266. In accordance with these principles, it is well settled that a testamentary trustee "will be liable to the cestuis if he allows the executor to retain possession longer than is required for the closing up of the estate, and a loss results." Bogert on Trusts and Trustees, Volume 3, Section 583. See also 32 A.L.R. 931, note, and 65 C.J. 685, Section 551.

In spite of these authorities, the respondents, on page 2 of their brief, contend that the Union Trust Company is not yet a trustee because "peradventure the property might be consumed in due course of administration and never reach the potential trustee." Under the respondents' view of the law a testamentary trustee must supinely await the distribution to him by the executor of the trust property. If, in the meantime, the executor wastes the assets of the estate or unduly prolongs its administration, that, according to the respondents, is a matter of indiffer-

ence to the trustee, for he is merely "a prospective or potential trustee" and has no rights or duties unless the executor chooses to distribute the trust property to him. The respondents' contention is obviously without merit.

In accordance with the rule that a testamentary trustee has very definite rights and duties immediately upon the testator's death and the probate of the will, the Union Trust Company brought this suit. Ann Porter died on December 21, 1940. Her will was admitted to probate on January 2, 1941. This suit was filed on April 17, 1944. (43) It is apparent that a reasonable time was allowed to elapse between the probate of the will and the filing of the suit.

As explained on page 17 of petitioner's brief in support of its petition for certiorari herein, one reason for filing the suit was because two prior decisions of the Supreme Court of Florida (Pelton v. First Trust & Savings Bank, 98 Fla. 748, 124 So. 169 and Patillo v. Glenn, 150 Fla. 73, 7 So. (2nd) 328) construing trust provisions for the perpetual addition of income to the principal of a charitable trust were hopelessly irreconcilable. The Union Trust Company desired a clear determination of the effect of the accumulation provision in the trust which it was to administer. If any part of the trust failed because of this provision, the Union Trust Company did not desire to take possession of or distribute property which was not lawfully a part of the trust.

Another reason for filing this suit was because the executor was using the income from the trust property to pay the decendent's debts and the expenses of administering her estate. The Union Trust Company contended

that this income could be used for such purposes only after the residuary estate and general legacies were exhausted. (50-51, 53-54, 392-393) It is obvious that this misuse of trust income could only be prevented by raising the question prior to the distribution of the estate by the executor. Otherwise the residuary and general legatees, whose legacies should have been used for these purposes, might have received and disposed of the assets bequeathed to them and the trustee's right of reimbursement would have been worthless.

Clearly, a testamentary trustee has not only the right but the duty to maintain appropriate legal actions even prior to the distribution of the trust property to him.

But respondents' argument to the contrary is unsound even on its own premise that no trust arises until the trustee acquires the trust property, for, under the Florida law, the devisee of real property becomes vested with the legal title thereto upon the death of the testator. The executor merely has the right to possession of the real estate during the period of administration. Redfearn on Wills and Administration of Estates in Florida, Section 153; Jones v. Federal Farm Mortgage Corp., 132 Fla. 807, 182 So. 226. Consequently, the respondents' argument that the Union Trust Company cannot maintain this suit because it did not have a vested interest in the trust property is without merit. Immediately upon Mrs. Porter's death and the probate of her will, the Union Trust Company became vested with the legal title to the Albemarle Hotels which were specifically devised to it as trustee under the will.

Finally, if there was the slightest merit to respondents'

argument that the Union Trust Company is merely a "prospective" trustee, the objection has certainly been waived by the failure to raise it in the Florida courts. The Supreme Court of Florida, in its opinion herein, and as a premise to its decision, twice refers to the right of the Union Trust Company to maintain this suit under the Florida statutes cited on page 17 of petitioner's brief in support of its petition for certiorari. (414, 423) The question must be considered as settled by that decision. It is certainly not a Federal question which may be raised in this Court for the first time.

II.

Respondents' contention, on page 3 of their brief, that the Union Trust Company is not "trustee of an express trust" within the meaning of the Florida statutes authorizing suits by such trustees is frivolous. There are but two kinds of trusts, express and implied. Implied trusts arise by operation of law. They are either resulting or constructive trusts. Express trusts are those arising from a declaration of intention to create a trust by the person owning the property made subject to the trust. A testamentary trust, such as that created by Mrs. Porter, is a common example of an express trust. 54 Am. Jur. 22, Section 5; Bogert on Trusts and Trustees, Volume 1, Sections 1 and 45; Scott on Trusts, Section 21. Furthermore, if there was any merit in this contention, it has been waived by the failure to raise the objection in the Florida courts.

III.

The respondents also contend that the constitutional right of the Theosophical Society cannot be raised or

enforced by the Union Trust Company as trustee. On page 5 of their brief they state that this right is "purely personal" and "cannot be vicariously enforced." Respondents cite no authority for their dogmatic statement.

But in Prince v. Massachusetts, 321 U. S. 158, 88 L. ed. 645, this Court permitted the legal custodian of a minor child to assert the child's right to religious liberty under the Federal Constitution.

Other analogous cases are Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, in which an alien was permitted to question the constitutionality of a statute requiring at least 80% of the employees of any person to be citizens of the United States; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, in which a white person who had agreed to sell land to a colored person was permitted to attack the constitutionality of an ordinance prohibiting the purchase of such land by a colored person; and Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, in which the owners of private schools were permitted to question the constitutionality of a statute requiring all children between the ages of eight and sixteen to attend the public schools.

It is true that, in each of the three cases last cited, the person raising the constitutional question had a property interest involved. But with that as a predicate, this Court in each case permitted one person to assert and enforce the constitutional rights of another. The principle of these cases is applicable to the case at bar. The Union Trust Company, as trustee, has a legal duty to protect the interest of the Theosophical Society in the Porter trust. For this purpose the trustee stands in the place of the bene-

ficiary. If the protection of the trust property requires the Union Trust Company to assert the constitutional right of the Theosophical Society to religious freedom, then the Union Trust Company is entitled to enforce that right. The decisions cited above establish that one person may assert the constitutional rights of another where that is the only practical way by which the right can be enforced.

The position of the Union Trust Company on this question may be illustrated by assuming, for the purpose of argument, that the Florida legislature had enacted a statute declaring illegal and void all bequests to religious organizations not of the Christian faith. Certainly, if such a statute had existed, the Union Trust Company could have attacked its constitutionality on behalf of and without the joinder of the Theosophical Society.

Furthermore, the right of the trustee to raise the constitutional question in a case such as that at bar may be absolutely necessary to afford to a beneficiary the religious liberty guarantied by the constitution. It is easy for the respondents to advance the theoretical argument that the right of religious liberty is so personal that it must be asserted by the beneficiary. But suppose the religious organization named as beneficiary is small and does not have the financial resources to finance extensive litigation? Does not the spirit of the constitutional guaranty permit the trustee to enforce the constitutional rights of such a beneficiary to the fullest extent necessary to protect its interest in the trust property? The question is its own answer.

The petitioner therefore submits that it may, as trustee, assert in this suit the right of the Theosophical Society

to religious freedom under the provisions of the Federal Constitution.

IV.

The real questions involved on this petition are whether the Supreme Court of Florida actually decided that the Theosophical Society was not a religious organization and, if it did, whether there is some other and non-Federal ground sufficient to support the judgment of the Supreme Court of Florida invalidating the Porter trust. These questions have been fully discussed in petitioner's brief in support of its petition for certiorari.

In answer to petitioner's brief on these questions the respondents contend, on pages 6 through 8 of their brief, that the Supreme Court of Florida did not pass upon the religious nature of the Theosophical Society but invalidated the Porter trust on the ground that "it sets up the corpus of the entire estate as a private memorial and provides that 50% of all income shall be used in perpetuity for the preservation of that memorial."

In support of their contention that the Supreme Court of Florida did not pass upon the religious nature of the Theosophical Society, the respondents make no attempt to explain how the Supreme Court of Florida could have held that the Porter trust violated the rule against perpetuities without also determining that the Theosophical Society was not a religious organization. The assertion that the trust is invalid because it created a memorial and because the accumulation provision was for the preservation of the memorial is merely an attempt to impart merit to two fallacious arguments by intermingling them.

Respondents' contention that the Supreme Court of Florida assumed, for the purposes of this case, that the trust beneficiaries were charitable is at variance with the plain language of the Court's opinion. The Court first held that the Porter trust was invalid because it violated the rule against perpetuities. It then said that a remaining question was the legal effect of the accumulation provision "and arguendo, conceding that the charity provision is public in character." (421) In the first place, if the trust was invalid because it violated the rule against perpetuities, then there was no remaining question. The trust was gone and anything said about the effect of the accumulation provision was surplusage. But, even in attempting to base its decision upon the alternative ground of the accumulation provision, the Court was careful to point out that it was treating the trust beneficiaries as charities only for the purpose of that alternative ground and not as a basis for the entire case. This must be true, for the Court had already conceded that, if the beneficiaries were charitable, the trust could not violate the rule against perpetuities. (421)

Respondents also adopt and emphasize the argument made by the Supreme Court of Florida that the provision for accumulating income is inseparable from the remainder of the trust. Neither the Supreme Court of Florida nor the respondents attempt to explain why the accumulation provision is inseparable from the remainder of the trust. The reason for this omission is quite clear. In Pelton v. First Trust & Savings Bank, 98 Fla. 748, 124 So. 169, the facts were identical with those in the case at bar. One half of the income was bequeathed to the Hillsborough County Humane Society in perpetuity and the other

half of the income was to be added to the trust corpus in perpetuity. The Court separated the accumulation provision from the remainder of the trust, held that the Hillsborough County Humane Society was entitled to one half of the trust income in perpetuity, that the provision for accumulating the second half of the trust income was invalid, that the decedent's widow, as his sole heir, was entitled to the second half of the trust income for her life, and that the disposition of the second half of the trust corpus was a matter for equitable adjudication after the death of the widow.

If the Supreme Court of Florida had applied the Pelton case to the instant case it would have been compelled to uphold the validity of at least half of the Porter trust. But the Court refused to apply the Pelton case to the instant case. Why was the accumulation provision separable from the remainder of the trust in the Pelton case and not in the instant case? The respondents offer no explanation. Can the respondents offer any explanation except the difference in the identity of the trust beneficiaries in the two cases?

The contention that the accumulation provision in the Porter trust is inseparable from the remainder of the trust and renders the entire trust invalid is also contradicted by the prior decision of the Supreme Court of Florida in Patillo v. Glenn, 150 Fla. 73, 7 So. (2nd) 328. In that case it was held that a direction to accumulate all of the trust income in perpetuity and loan it to worthy boys and girls to assist them in obtaining an education was valid and would be permitted to operate under the supervision of a court of equity so as to prevent the trust from becoming so large as to become a public menace. In the

case at bar, the Circuit Court of Pinellas County, Florida, held, in accordance with the Patillo case, that the provision for accumulation was valid and would be permitted to operate under the supervision of a court of equity. Why was the accumulation provision sustained in the Patillo case but held to invalidate the entire trust in the case at bar? Again, can the respondents offer any explanation for such action except the difference in the identity of the trust beneficiaries?

The most striking characteristic of the respondents' brief is its failure to even attempt to show that the asserted non-Federal grounds of the decision of the Supreme Court of Florida have any support either in the prior decisions of the Supreme Court of Florida or in the decisions from other states. This failure can only be construed as an admission that the so-called non-Federal grounds are without any fair or substantial support. The only remaining ground of the decision of the Supreme Court of Florida is, therefore, that the Theosophical Society and the other trust beneficiaries are not charitable organizations. This is a Federal question, reviewable by this Court.

CONCLUSION

In its recent decision in Everson v. Board of Education, decided February 10, 1947, this Court stated that "state power is no more to be used so as to handicap religions than it is to favor them." Certainly, any religious organization is handicapped by a judicial decision that it is not such a religious organization as will sustain a perpetual trust for its benefit. That is what the Supreme Court of Florida has decided with reference to the Theosophical Society in the case at bar. Petitioner submits that the decision of the Supreme Court of Florida on this question is reviewable by this Court.

FRANK M. HARRIS

HAROLD A. KOOMAN

Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1043

UNION TRUST COMPANY,
a Corporation, as Trustee under Paragraph Nineteenth of the Will of Ann Porter, Deceased,
PETITIONER,
vs.
BERTHA PAULINE GENAU, et al.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

BRIEF OF COUNSEL FOR RESPONDENTS

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE ISSUED

1. The Union Trust Company, *the sole petitioner,* cannot raise the questions attempted by it to be raised on behalf of the Theosophical Society.

2. There is no Federal question involved, hence this Court does not have jurisdiction to review the decision of the Supreme Court of Florida invalidating a will upon the ground that it violates the public policy of Florida against perpetuities.

3. This case does not warrant certiorari by any reasonable test.

We discuss these contentions briefly in the order named.

There is but one specification of error. It raises the question that the Theosophical Society has

> "been deprived of its liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

If so, the Theosophical Society (or at most the executor under the will, administration not having been completed or the estate turned over to the trustee, R. 43, 47), must raise the question. The so-called trustee cannot. It was not trustee when the will was filed and is not now trustee because it did not have or hold the property.

Section 733.01 Florida Statutes (1941) provides that

> "The personal representative shall take possession of the estate of a decedent, real and personal (except homestead) and the rents, income, issues and profits therefrom whether accruing before or after the death of the decedent, and of the proceeds arising from the sale, lease, or mortgage of the same or any part thereof. All such property and the rents, income, issues and profits therefrom shall be assets in the hands of the personal representative for the payment of legacies, debts, family allowance, estate and inheritance taxes, claims, charges and expenses of administration, and to enforce contribution and to equalize advancements and for distribution."

Peradventure the property might be consumed in due course of administration and never reach the potential trustee.

Actions can only be maintained by a party in interest — a present vested interest. A probable or prospective interest is not enough.

Jones v. Eastham, et al.
36 SW 2d 538.

In fact, the Union Trust Company had no right to file its bill in the State Court to have the will construed (R. 43) because the estate was still in process of administration (R. 43) and the bill specifically avers that

> "No distribution has yet been made to the Union Trust Company of any property devised or bequeathed to it as trustee of the foregoing Paragraph of the will of Ann Porter, deceased" (R. 47)

referring to said Paragraph Nineteenth of the will. It follows that the bill of the Union Trust Company to construe the will had no standing in Court, but since the executor had just filed a similar bill, there was no point in the trial court in moving to dismiss the bill of the so-called trustee. Counsels' brief, page 17, says:

> "Authority to represent trust beneficiaries in such actions is conferred upon trustees by Florida Statutes, 1941, Sections 63.08, 63.12 and 87.04, as amended."

We join issue upon this statement for several reasons:

(1) The Union Trust Company was not a trustee, at most it was only a prospective or potential trustee when the bill was filed, and so far as we, or the Court knows that condition still obtains. Said Section 63.08 provides that

> "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought."

Manifestly, the Union Trust Company was not "trustee of an express trust," or at all. Said Section 63.12 provides that

"In all suits concerning property which is vested in trustees where such trustees are competent to sell and give discharges for the proceeds of the sale, or the rents, income or profits of the estate, all or any such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents, income or profits, and in such cases it shall not be necessary to make the persons beneficially interested in such property, or rents, income or profits, parties to the suit;" etc.

The Bill of Complaint expressly shows that the suit was not

"concerning property which is vested in trustee"

because it says no distribution had been made to the trustee. (R.47)

Said Section 87.04 provides that

"Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or equitable or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or other; or

(2) To direct the executor, administrator, or trustee to abstain from doing any particular act in his fiduciary capacity; or

(3) To determine any question arising, in the administration of the estate or trust, including questions of construction of wills and other writings."

This Section does not authorize suit by a *potential trustee.*

"Before a party may secure a declaration of rights under declaratory judgment statute, it must appear that question raised is real and not theoretical and that party raising it has a bona fide and direct interest in the result."

Miami Water Works Local No. 654 v. *City of Miami (Fla.)*
26 So. (2d) 194

(2) The alleged Federal question presented by petitioner is outside of the limitations of this Section expressed in sub-sections "(1), (2), and (3)."

(3) Furthermore, none of the statutes cited by counsel contemplate that such grave and *purely personal* questions as the status of the Theosophical Society under the Fourteenth Amendment, or under the Federal Constitution's guarantee of religious liberty, should be decided in an action wherein the said Society is not a party, and particularly where such questions arise (if they have arisen) *only incidentally* in a suit to construe a will.

> "The general rule is, that in suits respecting trust property brought either by or against the trustees, the cestui que trust as well as the trustees are necessary parties."
>
> *John Carey, et al.*, vs. *Henry T. Brown*
> 92 U.S. 171, 23 L.Ed. 469
>
> *Griley* vs. *Marion Mortgage Co., et al.*,
> 132 Fla. 299, 182 So. 297

(4) Constitutional guarantees such as the right of liberty and to possess property are purely and distinctly personal. They are not assignable and cannot be vicariously enforced.

> 16 C. J. S., 157 et seq.
>
> "The trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust."
>
> Section 280, Restatement of the Law of Trusts.

Under this test the Union Trust Company cannot invoke for the benefit of the Theosophical Society constitutional

guarantees personal to such Society because such question would not arise if the Trust Company held the property free of trust. When such constitutional questions were injected into the action to construe the will (if they were injected) it became the duty of the Theosophical Society if it desired such questions litigated or its rights protected thereunder to intervene, and to have personally applied for this writ of certiorari.

> "A party appealing in order to have right of appeal must have some pecuniary interest or some personal right which is immediately or remotely affected and concluded by the decree appealed from."
>
> *Ballard, et al., vs. McGuire, et al. (Mass.)*
> 56 NE (2d) 891

SECOND: There is no Federal question involved, hence this Court does not have jurisdiction to review the decision of the Supreme Court of the State of Florida.

Opposing counsel admit that no Federal question was decided by the Supreme Court of Florida, but make the strange contention, wholly unsupported by the record, that the Florida Court could not have construed Ann Porter's will without deciding whether the Theosophical Society is a religious organization, and having failed to do so the decision was essentially arbitrary or a mere device to prevent its review by this Court within the rule of

McCoy vs. Shaw
277 U.S. 302, 72 L.Ed. 891

This contention is inconsistent with the alleged uncertainties of the will and the reasons for its construction as set forth in Petitioner's Bill of Complaint (see Paragraph 5 of the bill, R. 47-48, and the prayer of the Bill, R. 52-54). The prayer "(b)" is that the Court

> "Determine and decree whether Paragraph Nineteenth of said Will directs the accumulation of one-half of the net income from the trust thereby created for a period longer than is permitted by law."

The Court held that it does and is, therefore, void under the law against perpetuities. (R. 418-421) The Court then said:

> "The conclusion having been reached that the creation of the Porter-Genau memorial fund in perpetuity violates the common law rule against perpetuities and our former adjudications, then a pertinent question arising on the record is, namely: what is the legal effect of the invalid provision of paragraph 19 on the charitable provision of the same paragraph, *and arguendo, conceding that the charity provision is public in character.*" (R. 421)

After quoting from several authorities, the Court states its conclusion as follows:

> "Thus it is to be observed that the financial provisions of the Porter-Genau Memorial Fund and the several charitable bequests become dependent on each other; the source of financial existence and income for the two funds are inextricably interwoven; there is such a co-mingling of the two funds as to render them inseparable; if the cy pres doctrine is applied the two funds remain indivisible. *The illegality of the Porter-Genau Memorial Fund takes with it and renders void the several bequests in paragraph 19 for charity.*" (R. 423)

So it is that for the purpose of deciding the case, the Florida Court assumed that the Theosophical Society is a charity, also the other eight so-called charitable objects, but the Court said that the provisions for charity being inseparable from the invalid provision for a perpetual memorial, the whole must fall. Similarly prayer "(c)" of the Bill (R. 52) asks the Court to specify what the consequence would be

> "if this Court should determine that Paragraph Nineteenth of the will of Ann Porter, deceased, directs the accumulation of one-half of the income from the trust thereby created for a longer period than is permitted by law"

and the Court did just that. Likewise, prayer "(d)" asks the Court to say whether in such an event Paragraph Nineteenth is invalid. Prayers "(e)" and "(f)" are to the same general effect; also prayers "(g)" and "(h)" ask the Court to define the plaintiff's duties as trustee under certain circumstances. All of which involve the validity of Paragraph Nineteenth of the will. If it was invalid the potential trustee had no duties with reference to it.

Counsel overlook the important fact that the determination of the status of the Theosophical Society as a charity (religious organization) never became necessary because the Court disposed of the case on another point, which had to be determined before the question of the status of the Theosophical Society would become pertinent. If the will had been sustained against the objection that it sets up the corpus of the entire estate as a private memorial and provides that 50% of all income shall be used in perpetuity for the preservation of that memorial, the next step would have involved the competency of the nine specified objects to participate in the other one-half of the income, which the trustee out of the memorial fund was directed to distribute annually. At that point the question might have become pertinent whether the Theosophical Society is a public charity, but the will was found to be invalid before reaching that point.

Notwithstanding, the Florida Court says:

> "We have reached the conclusion in the case at bar that paragraph 19 offends the rule against perpetuities and our previous adjudications," (R. 425)

and, notwithstanding, the Court assumed for the purpose of its decision that the nine objects named in Paragraph Nineteenth are charitable, opposing counsel charge in effect that the Court was so prejudiced against the Theosophical Society that it based its decision on an unfederal ground in order that it might deprive the Theosophical Society of rights under the will and prevent a review by this Court. This charge is fantastic and reckless. It is manifestly unjustified by the record, which on the contrary shows that the Court truly stated the ground of its decision.

> "When the decision of the State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it."
>
> *Williams v. Kaiser*
> 323 U.S. 471, 89 L.Ed. 397

Of course, there was no Federal ground upon which the Florida Court might have planted its decision, but be that as it may the rule above quoted requires the dismissal of the petition for certiorari.

THIRD: Certiorari not warranted.

Incidentally, if we were wrong in everything we have heretofore said in this brief, it is true nevertheless that this case does not fall within the class of cases which this Court will review upon certiorari.

Our failure to reply to other contentions of opposing counsel must not be construed as admission thereof or concurrence therein, but we deem them too far at variance with the facts and law to justify further extension of this brief. Obviously, it would be out of place here to argue the character of the Theosophical Society

which, however, has been the subject of judicial consideration.

In re Carpenter's Estate
297 N.Y.S. 649

Korstroms vs. Barnes
167 Fed. 216

New England Theosophical Corp. vs. City of Boston
51 N.E. 456

Respectfully submitted,

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